

Message Text

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SUBJECT: NEW YORK TIMES ARTICLE REGARDING ICSID BAUXITE
ARBITRATION IN JAMAICA

FOR AMBASSADOR GERARD

1. FYI: FOLLOWING IS AN ARTICLE WHICH APPEARED IN THE NEW
YORK TIMES ON THURSDAY, OCTOBER 2, 1975.

2. TITLE OF ARTICLE IS BAUXITE TAX TESTING ARBITRATION
UNIT.

3. BEGIN QUOTE: WASHINGTON, OCT. 1. THE UNITED STATES
GOVERNMENT HAS TAKEN A KEEN INTEREST IN A SLOW-MOVING, BUT
PROBABLY PRECEDENT-SETTING, INTERNATIONAL ARBITRATION PRO-
CEEDING INVOLVING THREE BIG UNITED STATES ALUMINUM COMPANIES
AND THE GOVERNMENT OF JAMAICA OVER TAXES ON BAUXITE.

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4. THE ARBITRATION TRIBUNAL (THREE WELL-KNOWN LAWYERS AND

JUDGES FROM DENMARK, BRITAIN AND IRAN) IS MEETING IN LONDON THIS WEEK TO DECIDE A PROCEDURAL ASPECT OF THE CASE. BUT THE DECISION ON SUBSTANCE--WHETHER JAMAICA, BY A SEN-?OLD INCREASE IN TAXES ON BAUXITE IN 1974, VIOLATED A VALID CONTRACT--WILL COME LATER.

5. THE CASE IS A TEST OF THE LITTLE-KNOWN INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, ESTABLISHED ALMOST 10 YEARS AGO UNDER THE AUSPICES OF THE WORLD BANK. BOTH THE UNITED STATES AND JAMAICA ARE SIGNATORIES OF THE CONVENTION ESTABLISHING THE CENTER, ALONG WITH ABOUT 70 OTHER COUNTRIES.

6. THE ICSID, AS IT IS KNOWN, SET UP PROCEDURES FOR SETTLING RECURRENT DISPUTES BETWEEN FOREIGN COMPANIES AND HOST COUNTRIES. THE ARBITRATION PROCEDURES ESTABLISHED BY THE CONVENTION HAVE NEVER YET BEEN CARRIED TO A CONCLUSION, THOUGH TWO OTHER CASES BESIDES THE BAUXITE ONE ARE NOW AT THE ARBITRATION STAGE.

7. IN THE BAUXITE CASE JAMAICA HAS DECLINED TO PARTICIPATE IN THE PROCEEDINGS. AFTER PASSING THE TAX INCREASE IN MID-1974, THE JAMAICAN GOVERNMENT SIMPLY NOTIFIED ICSID THAT IT REGARDED QUOTE ANY LEGAL DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT RELATING TO MINERALS OR OTHER NATURAL RESOURCES UNQUOTE AS NOT SUBJECT TO THE CONVENTION.

8. THIS PROMPTED A PROTEST FROM THE UNITED STATES, IN THE FORM OF A LETTER FROM EDWARD C. SCHMULTS, THEN GENERAL COUNSEL OF THE TREASURY, TO A. BROCHES, THE SECRETARY GENERAL OF ICSID. MR. SCHMULTS SAID THAT, UNDER THE TERMS OF THE CONVENTION, A COUNTRY COULD DECLARE SOME KINDS OF INVESTMENTS EXEMPT FROM ITS PROVISIONS ONLY BY A NOTICE IN ADVANCE, NOT AFTER THE FACT. THIS WAS CIRCULATED BY MR. BROCHES TO ALL THE MEMBER NATIONS, AS WAS THE JAMAICAN NOTICE.

9. THE KEY PRELIMINARY DECISION CAME LAST JULY WHEN THE THREE-MAN ARBITRATION TRIBUNAL RULED THAT IN TWO OF THE THREE CASES--THOSE INVOLVING THE KAISER ALUMINUM AND UNCLASSIFIED

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CHEMICAL CORPORATION AND THE ALUMINUM COMPANY OF AMERICA--IT HAD JURISDICTION, DESPITE JAMAICA'S NOTICE. THE TRIBUNAL WILL PROBABLY DECIDE THIS JURISDICTION ISSUE WITH RESPECT TO THE REYNOLDS METALS COMPANY CASE THIS WEEK.

10. JAMAICA HAS DECLINED TO FILE ANY BRIEFS IN THE CASE AND HAS ALSO DECLINED TO APPOINT AN ARBITRATOR. AS A RESULT, ROBERT S. MCNAMARA, PRESIDENT OF THE WORLD BANK, HAD

TO NAME THE ARBITRATION TRIBUNAL UNDER THE TERMS OF THE CONVENTION.

11. A COMPLICATING FACTOR HAS BEEN THAT KAISER AND REYNOLDS HAVE ANNOUNCED THEIR INTENTION OF NEGOTIATING AN ENTIRELY NEW AGREEMENT WITH JAMAICA GOVERNING THEIR BAUXITE INVESTMENTS. THEY HAVE SAID THAT, IF A FULL AGREEMENT CAN

BE REACHED, THEY WILL WITHDRAW THEIR COMPLAINTS IN THE ICSID PROCEEDING. BUT ALCOA APPARENTLY INTENDS TO FIGHT THE ISSUE TO THE END.

12. WHILE THE UNITED STATES GOVERNMENT IS NOT A PARTY TO THE DISPUTE, AN INTERNAL STATE DEPARTMENT MEMORANDUM SAYS THAT THE GOVERNMENT IS QUOTE PLEASED THAT THE ICSID TRIBUNAL WILL HEAR THE CASE ON ITS MERITS UNQUOTE. THE MEMORANDUM SAYS, QUOTE THE ICSID PROCEEDINGS INVOLVE UNITED STATES GOVERNMENT INTERESTS THAT GO BEYOND BAUXITE ISSUES--THOSE OF ESTABLISHING A VIABLE MECHANISM FOR THE SETTLEMENT OF INVESTMENT DISPUTES AND PROTECTING THE INTEGRITY OF INVESTMENT AGREEMENTS AND TREATIES UNQUOTE.

13. THE BIG QUESTION, BOTH UNITED STATES AND ICSID OFFICIALS AGREE, IS WHAT WILL HAPPEN IF THE ARBITRATION TRIBUNAL FINDS IN FAVOR OF THE ALUMINUM COMPANIES--OR POSSIBLY JUST ALCOA--AND ORDERS MONETARY COMPENSATION. NO CASE HAS YET REACHED THAT STAGE UNDER THE CONVENTION, AND JAMAICA MIGHT SIMPLY REFUSE TO PAY. END QUOTE. END FYI. KISSINGER

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